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Sup. Ct.

In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 880

ROBERT J. SWEM,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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OCTOBER TERM, 1946

No.....

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vs.
THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

OPINION OF THE LOWER COURT

The opinion of the Supreme Court of the State of Michigan is not reported. The Court entered its order as follows:

> "In this matter, a petition is filed for the allowance of a Writ of Habeas Corpus, and a Brief in opposition thereto having been filed by the Attorney General, and due consideration thereof having been had by the Court,
>
> It is ordered that the petition be and the same is hereby denied, as we find there is no merit in defendant's petition, he was not deprived of securing counsel, and under our decisions he cannot complain, particularly at this late date" (R. 24).

JURISDICTION

Jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code as amended, Title 28, Section 344 (b), U. S. C. The order of the Supreme Court of Michigan was entered on October 18th, 1946 (R. 24).

QUESTIONS PRESENTED

1. Whether or not due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, has been denied a youth of eighteen years of age, by taking him into custody, holding him incommunicado from August 27th to September 2nd, 1931, during which time he was continuously questioned by police officers and an assistant prosecuting attorney. Charged with the crime of murder, arraigned in court, entered a plea of guilty and sentenced on the same day (September 2, 1931) to life imprisonment without benefit of counsel.

2. Whether or not due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, is denied, where a youth of eighteen years of age, ignorant of his legal rights, charged with the crime of murder, is not informed by the Court, prosecuting attorney or anyone, that he is entitled to counsel, and is not informed of the difference between the degrees of murder (first and second) and manslaughter.

3. Whether or not due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, is denied, where a youth of eighteen years of age, ignorant of his legal rights, charged with the crime of murder, is without counsel, the Court fails to appoint counsel for him, was not advised that he was entitled to the services of counsel, and did not understandingly or knowingly waive any of his rights to be represented by counsel.

4. Whether or not due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, is denied, where a youth of eighteen years of age, ignorant of his legal rights, charged with the crime of murder is without counsel and not having waived his constitutional rights is sentenced to life imprisonment for murder in the first degree without a trial and without a full, deliberate, free and voluntary plea of guilty.[1]

---

[1] The questions here presented are similar to those presented to this Court in Case No. 140, October Term, 1946, *De Meerleer v. People of the State of Michigan.*

STATEMENT

The petitioner on August 27th, 1931 was arrested by police officers of the City of Detroit,[1] held in three different police stations in the City of Detroit until September 2nd, 1931 when he was arraigned upon information, charged with the crime of murder, entered a plea of guilty and sentenced to life imprisonment (R. 23).

The petitioner at the time of the sentence and prior thereto, was not represented by counsel, had not the opportunity to consult with counsel, was not advised that he was entitled to the services of counsel, nor did he understandingly or knowingly waive any of his rights to be represented by counsel (R. 4). That he was not represented by counsel is admitted in the answer of the people,

> "Defendant was not then represented by counsel and did not request such representation. He had opportunity to consult counsel. Instead he chose voluntarily to plead guilty. In Michigan such voluntary choice is held to be a waiver by representation of counsel" (R. 16).

Further, the answer of the people states,

> "Defendant not only did not ask that counsel be appointed, but he would probably not have been entitled to have counsel assigned to him by the state, since a showing of inability to pay is a prerequisite to such assignment" (R. 16).

and again,

> "At the time of his sentence by Judge John V. Brennan, defendant was not represented by counsel" (R. 15).

---

[1] People state there is no record of petitioner's arrest on August 27th, 1931 (R. 13), contending he was arrested on August 29th, 1931 (R. 13).

In September, 1945, petitioner filed in the Recorder's Court for the City of Detroit, a motion to vacate and set aside the plea of guilty and sentence entered on September 2nd, 1931 on the ground that the plea of guilty was made in ignorance of his rights as provided by the Fourteenth Amendment to the Constitution of the United States (R. 5). That said petition was denied (R. 5), Exhibit B (R. 9).

That thereafter on the 9th day of January, 1946, the Supreme Court of the State of Michigan denied petitioner's request to appeal from the order of the Recorder's Court of the City of Detroit, denying the motion setting aside his plea of guilty and sentence (R. 6). Thereafter a petition for Writ of Habeas Corpus was filed in the Supreme Court of the State of Michigan (R. 2-7) upon the grounds, among other things, that he was deprived of his constitutional rights as provided in the Fourteenth Amendment to the Constitution of the United States (R. 5). That said petition was denied (R. 5), Exhibit B denied the allowance of the writ on the 18th day of October, 1946, stating,

> "there was no merit in defendant's petition as he was not deprived of securing counsel, and under our decisions he cannot complain, particularly at this late date" (R. 24).

Petitioner further stated in his reply to the answer of the people of the State of Michigan, that he made no signed statements pertaining to the crime and that any statements attributed to him were not free and voluntary but were a result of coercion, threat, intimidation and promises of leniency (R. 22).

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

The question of the constitutional rights of the petitioner as provided in the Fourteenth Amendment to the Constitution of the United States was raised during all the proceedings beginning with the Petition to Vacate and Set Aside the Sentence, and in petitioner's Application for Writ of Habeas Corpus filed in the Supreme Court of the State of Mihcigan (R. 4-5).

SPECIFICATIONS OF ERRORS TO BE URGED

The Michigan Court erred:

1. In holding that petitioner was not denied any constitutional right of representation.

2. In holding that the petitioner was not denied due process of law.

3. In denying petitioner's Application for Writ of Habeas Corpus.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

THE DECISIONS OF THE MICHIGAN SUPREME COURT ON FEDERAL QUESTIONS OF SUBSTANCE IS IN CONFLICT WITH DECISIONS OF THIS COURT

The petition for Writ of Habeas Corpus filed in the Supreme Court of the State of Michigan was based primarily on the Fourteenth Amendment to the Constitution of the United States (R. 4). The people in their answer, denied that petitioner was deprived of his constitutional rights (R. 17); further,

> "He was not deprived of the right to have assistance of counsel, but voluntarily waived that right by not hiring counsel and by not asking to have counsel appointed" (R. 17-18).

The Supreme Court of the State of Michigan in its order, denying petitioner's Application for Writ of Habeas Corpus states,

> "He was not deprived of securing counsel, and under our decisions, he cannot complain, * * *" (R. 24).

The facts in this case clearly show that the petitioner has been denied due process of law under the decisions of this court.

It is undisputed that the petitioner was not represented by counsel, that the trial court did not ask him if he desired counsel, nor was he informed that he was entitled to the services of counsel. The People of the State of Michigan contend that he voluntarily waived his right to

counsel by not hiring counsel and by not asking to have counsel appointed for him (R. 17-18).

Further the people contend that in Michigan a voluntary plea is a waiver of representation by counsel (R. 16). Petitioner was denied an interview with the court prior to entering his plea (R. 22).

The Supreme Court of the State of Michigan states that the petitioner cannot complain, *particularly at this late date.* The passage of time should not be construed as a waiver of any of the petitioner's rights, inasmuch as he must spend the remainder of his life in prison and is not eligible for parole. The passage of time should not validate proceedings that were invalid at the time they were had, because they violated the petitioner's constitutional right to due process of law. In view of these facts, petitioner was denied due process of law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the State of Michigan relied upon its former decisions[1] denying your petitioner's Application for Writ of Habeas Corpus, which is contrary to the holdings of this Court.[2]

The importance of the questions presented is shown by the fact that the Supreme Court of the State of Michigan

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[1] *People v. Williams*, 225 Mich. 133, 195 N.W. 818; *People v. Crandell*, 270 Mich. 124, 258 N.W. 244; *People v. Fries*, 294 Mich. 382, 293 N.W. 689; *People v. Kotek*, 306 Mich. 408, 11 N.W. (2d) 7, cert. denied 323 U. S. 790; *People v. Haddad*, 306 Mich. 556, 11 N.W. (2d) 240.

[2] *Powell v. Alabama*, 287 U. S. 45; *Williams v. Kaiser*, 323 U. S. 471; *Tomkins v. Missouri*, 323 U. S. 485; *House v. Mayo*, 324 U. S. 42; *Rice v. Olson*, 324 U. S. 786; *Hawk v. Olson*, 326 U. S. 271.

Further, petitioner was denied due process in that he was sentenced to life imprisonment without his full, free, unreserved and deliberate plea of guilty. *Smith v. O'Grady*, 312 U. S. 329.

has ignored the decisions of the Supreme Court of the United States relating to the constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In the order denying the Writ of Habeas Corpus (R. 24) the Supreme Court of the State of Michigan stated,

> "• • • under our decisions he cannot complain • • •"

inferring that under other decisions the petitioner had a just complaint and without a doubt, having in mind the decisions of the Supreme Court of the United States. Therefore, there is a serious conflict in the decisions of the Supreme Court of Michigan and of this court.

II.

THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED ARE OF VITAL IMPORTANCE

The questions presented here are very similar to those presented to this court in *De Meerleer v. People of the State of Michigan* in which this court granted a Writ of Certiorari to the Supreme Court of the State of Michigan (Case No. 140, October Term, 1946).

The questions presented are of vital importance because they pertain to the basic rights of individuals as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Further, that in Michigan, a person sentenced to life imprisonment for first degree murder is not entitled to parole, his only recourse is to the courts, and executive clemency. Petitioner has exhausted his remedies in the courts of the state of Michigan and has been denied relief. His only remaining opportunity of being accorded

due process of law, in accordance with his constitutional rights, is in the issuance by this Honorable Court of its Writ of Certiorari to the Supreme Court of the State of Michigan.

CONCLUSION

WHEREFORE, it is respectfully prayed that this petition for a Writ of Certiorari to the Supreme Court of Michigan be granted.

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Dated:

In the

Supreme Court of the United States

OCTOBER TERM, 1946

No.....

ROBERT J. SWEM,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER'S BRIEF

STATEMENT OF FACTS

On the 27th day of August, 1931, the petitioner was arrested by the police officers of the City of Detroit, confined and held incommunicado at the McClellan Avenue Police Station, transferred to the Conner Avenue Police Station on the 28th day of August and held incommunicado, on the 29th day of August transferred to the Central Police Station, there held incommunicado until the 1st day of September, 1931 when he was taken to the Recorder's Court and arraigned upon a warrant charging him with

the crime of murder (R. 2-3). The People state that the records do not show the petitioner's arrest until August 29th (R. 13). During petitioner's confinement, he was continuously questioned by police officers and an assistant prosecuting attorney (R. 3). This was admitted by the People in their answer (R. 13).

On the 2nd day of September, 1931, petitioner was arraigned before a judge of the recorder's court upon information, charging him with the crime of murder (R. 3). Prior to entering a plea of guilty, petitioner requested an interview with the court but his request was denied (R. 22). That he entered a plea of guilty and was immediately sentenced to be confined in prison for the remainder of his natural life.

The petitioner was not, at any time, represented by counsel, had not the opportunity to consult with counsel, was not advised that he was entitled to the services of counsel, nor did he understandingly or knowingly waive any of his rights to be represented by counsel (R. 4). The people admit that the defendant was not represented by counsel and did not request such representation, but contend that, instead he chose voluntarily to plead guilty, and in Michigan such voluntary choice is held to be a waiver of representation by counsel (R. 16). The people further admit that the defendant not only did not ask that counsel be appointed, but he probably would not have been entitled to have counsel assigned to him by the state since a showing of inability to pay is a prerequisite to such assignment (R. 16-17).

QUESTION PRESENTED

The question here is whether or not the petitioner has been denied the constitutional rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

This Court has recently passed upon a similar question in *Rice v. Olson, Warden*, 324 U. S. 786, holding that,

> "a defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant is charged with an offense of this character (burglary) is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel. Whether all these conditions exist is a matter which must be determined by evidence where the facts are in dispute."

It is undisputed that the petitioner was not represented by counsel, was not advised that he was entitled to counsel. However the People of the State of Michigan contend that a plea of guilty waives a right to counsel.

In *Williams v. Kaiser*, 323 U. S. 471, 65 S. Ct. 363, this Court held,

> "Like other judgments, a judgment based on a plea of guilty is not, of course, to be lightly impeached in collateral proceedings * * * But a plea of guilty to a capital offense made by one who asked for counsel but could not obtain one and who was incapable adequately of making his own defense stands on a different footing. Robbery in the first degree by means of a deadly weapon is a capital offense in Missouri; the law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny and petit larceny. These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime and the various defenses which are available. These

are a closed book to the average layman. These considerations underscore what was said in *Powell v. Alabama*, 287 U. S. at page 69. • • • The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing —a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser v. United States*, 315 U. S. 60, 75, 76. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

"These are the reasons why the right to counsel is 'fundamental.' *Powell v. Alabama, supra*, 287 U. S. at page 70, 53 Supreme Court, at page 64, 77 L. Ed. 158, 84 A. L. R. 527; *Grosjean v. American Press Co.*, 297 U. S. 233, 243, 244, 56 Supreme Court, 444, 446, 447, 80 L. Ed. 660; *Avery v. Alamaba*, 308 U. S. 444, 447, 60 Supreme Court 321, 322, 84 L. Ed. 377. They indicate the protection which the individual needs when charged with crime. Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accommodated to the constitutional guarantees of the individual."

The decisions of the Supreme Court of the State of Michigan upon the questions here presented, are contrary to the decisions of this Court.

The Michigan Supreme Court held as follows:

> That although the constitution of Michigan (art. 2, Sec. 19) secures to an accused the right to have counsel for his defense, it does not mean that he shall have it at public expense, but as a guarantee of the right to employ counsel; that an accused is not entitled as of right, to have counsel assigned by the court to advise him relative to his plea, that being a matter of judicial discretion; and that the trial judge is not bound to advise an accused of his right to counsel. That if the defendant fails to procure counsel, his neglect to request Court to assign counsel, constituted a waiver of his constitutional and statutory rights.

People v. Williams, 225 Mich. 133;
People v. Harris, 266 Mich. 317;
People v. Posoni, 233 Mich. 462;
People v. Crandell, 270 Mich. 124;
People v. Fries, 294 Mich. 382;
People v. Haddad, 306 Mich. 555.

Respectfully submitted,

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United States of America

IN THE

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OCTOBER TERM, 1946

No. 880

ROBERT J. SWEM,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent

Application for Certiorari to the Supreme Court
of the State of Michigan

PETITIONER'S REPLY BRIEF

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Application for Certiorari to the Supreme Court
of the State of Michigan

PETITIONER'S REPLY BRIEF

The People of the State of Michigan, (hereinafter referred to as the People) indirectly admit that petitioner is entitled to relief, the facts in the instant case are identical with the facts in the case of *Rene DeMeerleer, petitioner, v. The People of the State of Michigan, re-*

spondent, decided by this Court on February 3rd, 1947 (No. 140, October Term 1946).

However, the People oppose the granting of the relief prayed for, upon the following grounds:

1. That petitioner has no *absolute right* to prosecute the Writ of *Habeas Corpus* in the Supreme Court of the State of Michigan, (hereinafter referred to as the State Supreme Court) such procedure being inappropriate.

2. That the matters set forth in the petition filed in the State Supreme Court are *Res Adjudicata.*

3. That since the State Supreme Court's decision *might* have been on either State or Federal grounds, and the State grounds alone being sufficient, the Writ of Certiorari should be denied.

ARGUMENT

I.

Is the Procedure Adopted by the Petitioner Inappropriate?

No question was raised by the People to the procedure adopted by the petitioner in the State Supreme Court.

The People have presented Michigan statutes and Michigan cases in an endeavor to sustain the rule that,

> "A Writ of *Habeas Corpus* cannot be substituted for a writ of error."

However, they have admitted in the latest case decided by the State Supreme Court upon this subject, *in re: Elliott,* 315 Mich. 662, the rule is not a hard and fast rule and can be overlooked, as the Court said in the Elliott case at page 666,

> "We overlook the rule often repeated here, that the Writ of *Habeas Corpus* cannot be used as a writ of error or claim of appeal from the judgment or sentence of the court. The grounds on which petitioner seeks to be discharged from custody will be considered on the merits."

In re: Elliott Supra, one of the grounds raised by the petitioner was,

> "1. That this sentence and detention are unlawful because he was sentenced without advice of counsel or having waived that right; * * *."

The Elliott case above referred to, was decided by the State Supreme Court on October 7th, 1946 and the decision in the instant case was rendered by the same Court

on October 18th, 1946. Both cases were pending before the State Supreme Court at the same time.

The State Supreme Court considered the petition for Writ of *Habeas Corpus* in the instant case and rendered its decision based upon the merits, in fact, the People filed an answer to the petition and stated,

> "This answer is filed for the purpose of bringing before the appellate court, the contents of the records of the Recorder's Court for the City of Detroit and the contents of the files kept by the Homicide Squad, in re Robert Swem and Clifford LaFrance" (R. 12).

and in denying petitioner relief stated,

> "• • • we find there is no *merit* in defendant's petition • • •."

The People further contend in their brief that *Habeas Corpus* is inappropriate and unsuitable to determine questions involving disputed facts, and where facts are in dispute the Trial Court is the proper forum to resolve the issue.

There are sufficient facts in the instant case that are not disputed to warrant this Court in granting the writ prayed for.

The People have admitted,

> "• • • defendant was not then represented by counsel and did not request such representation • • •" (R. 16).

> "• • • defendant not only did not ask that counsel be appointed but he would probably not have been entitled to have counsel assigned to him by the State since a showing of inability to pay is a prerequisite to such assignment" (R. 16-17).

"• • • he was not deprived of the right to have assistance of counsel, but voluntarily waived that right by not hiring counsel and by not asking to have counsel appointed" (R. 17).

"• • • at the time of his sentence by Judge John V. Brennan defendant was not represented by counsel" (R. 15).

Answering the contention of the People that the Trial Court should first be given an opportunity to correct any error, the record indicates that the Trial Judge did have an opportunity to rectify the injustice but denied petitioner relief (R. 9-10).

II.

Are the Matters Set Forth in the Petition Res Adjudicata?

Likewise, this question was not presented to the State Supreme Court.

It is the contention of the People that the time to apply to this Court for a Writ of Certiorari expired in April of 1946 inasmuch as the State Supreme Court in January of 1946 denied petitioner the right to appeal from the order of the Recorder's Court for the City of Detroit, denying the motion to vacate and set aside his plea of guilty. In denying petitioner leave to appeal, the State Supreme Court did not give the reason why petitioner was denied leave to appeal. Be that as it may, the State Supreme Court did in the instant case, accept the petition for Writ of *Habeas Carpus,* the People filed a full and complete answer to the petition, and the State Supreme Court rendered a decision upon the merits. That being a final judgment by the highest Court of the state, these proceedings were then instituted under Title 18, section 344 (b), U. S. C. A.

III.

Should the Writ of Certiorari Be Denied Since the Lower Court Might Have Decided the Question Upon State Grounds?

I believe that this question has been fully and completely decided by this Court in the DeMeerleer case (No. 140 October Term 1946).

The State Supreme Court rendered its decision in *DeMeerleer v. The People of the State of Michigan,* 313 Mich. 548, on March 4th, 1946, and apparently had that decision in mind as well as others when it stated in its opinion, in the instant case,

> "• • • under our decisions he cannot complain."

However, this Court in reversing the decision of the State Supreme Court in *DeMeerleer v. The People supra,* stated,

> "The court indicated that it had given consideration to the case of *Hawk v. Olson,* 326 U. S. 271 (1945) and the authorities cited therein, but concluded that the rule of the Michigan cases was determinative. See *People v. Williams,* 225 Mich. 133, 195 N. W. 818 (1923). *In this there was error.*"

So in the instant case no doubt the State Supreme Court did give consideration to the decisions of this Court but concluded that under the State Court decisions petitioner could not complain. Indicating very strongly that under the decisions of this Court petitioner could complain of a violation of his constitutional rights.

CONCLUSION

It is therefore respectfully submitted that in accordanct with the holdings of this Court, petitioner has been deprived of rights essential to a fair hearing under the Federal constitution and the relief prayed for should be granted.

Respectfully submitted,

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October Term 1946

Robert J. Swem, Petitioner, v. The People of the State of Michigan.	Application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

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1947

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Michigan Constitution, art. 7, § 10 7

Federal Constitution, art. 1, § 9, cl 2 7

Gillespie's Michigan Criminal Law and Procedure,
Vol. 1, p. 841, § 705 10

No. 880

In the Supreme Court of the United States

October Term 1946

Robert J. Swem, Petitioner, v. The People of the State of Michigan.	Application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

I

Counter-Statement of Matters Involved.[*]

The petitioner seeks a writ of certiorari to review an order (24) of the supreme court of the State of Michigan which denied a writ of *habeas corpus*[1] to inquire into the legality of his commitment to state prison pursuant to a judgment of the recorder's court of the city of De-

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[*] Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief refer to pages of the printed record of the court below.

[1] The petitioner attempted to prosecute the writ of habeas corpus under the Michigan Judicature Act, Chapter 87, §§ 7-12, et seq. (3 Mich. Comp. Laws 1929, §§ 15206-15211 [Mich. Stat. Ann. §§ 27.2250-27.2255]).

troit convicting him on his plea of guilty to an information that charged the crime of murder,[2] and sentencing him to serve a life term of imprisonment therefor.

The petition (2-10) for *habeas corpus* filed in the court below,[3] attempts to trace the course of events and procedure from petitioner's arrest by Detroit police officers on the 27th day of August 1931 (2-3) to the sentence imposed upon him on the 2nd day of September 1931 (3-5); it alleges that petitioner was unlawfully arrested, held *incommunicado*, transferred from one police station to another, unrepresented by counsel and without opportunity to consult with counsel; that he was not advised that he was entitled to the service of counsel, 'nor did he understandingly waive any of his rights to be represented by counsel'; and (4-5) that his restraint and imprisonment, therefore, is in violation of his constitutional rights guaranteed by the 5th, 6th and 14th Amendments to the Constitution of the United States.

The attorney general accepted (10-12) and filed an answer (12-20) prepared by the director of research of the trial court based upon her examination of court records and files in two criminal cases involving Robert Swem (the petitioner here), one for robbery, while armed (Mich. Penal Code, § 529 [Mich. Stat. Ann. § 28.797]), the other for the murder charged against petitioner and for which he was sentenced in this cause, upon her examination of a file of the homicide squad of the Detroit

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[2]

Michigan Penal Code, §§ 316-318 (5 Mich. Comp. Laws Supp. §§ 17115-316 - 17115-318 [Mich. Stat. Ann. §§ 28.548-28.550]).

[3]

It would appear that this petition was prepared and filed by the petitioner in proppia persona.

police department, upon her examination of files in the probation office of the court in such cases and a check of arrest records in the central bureau at police headquarters as well as records of an outlying police precinct (19). That document answers the petition for *habeas corpus* paragraph by paragraph, admitting, denying, or explaining the several allegations thereof.

Counsel for the petitioner filed a reply (20) to the State's answer, supported by petitioner's affidavit (21-23) in which he admits, explains, or denies affirmative averments of the answer and reiterates what he had already alleged in his petition.

On the 18th day of October 1946 the Michigan supreme court entered an order (24) denying the writ of *habeas corpus*, stating that 'we find no merit in defendant's position, he was not deprived of securing counsel, and under our decisions he cannot complain, particularly at this late date'.

The pending petition for certiorari was docketed in this Court on the 13th day of January 1947, and on the 3rd day of February 1947 the case of *De Meerleer* v. *Michigan* (October Term 1946, Docket No. 140) was decided. The Court thereupon extended time for filing this brief, to and including the 3rd day of March 1947.

II

Summary of the Argument.

The State's position, presently defined, is that decisive, substantial, non-federal grounds sustain the Michigan court in its order denying the writ of *habeas corpus.*

1. The substantial and decisive state grounds which might be the bases of the lower court's refusal of the writ are these:

(a) Prosecution of a writ of *habeas corpus* under Michigan law,[4] and decisions of her highest court,[5] is not the proper procedure to determine whether one convicted by a corut of competent jurisdiction of a criminal offense, has been deprived of any constitutional right, the appropriate Michigan procedure, followed by counsel for *De Meerleer,* being to move for leave to file a delayed motion for new trial in the court in which such a conviction has been had.

(b) The same, identical federal questions raised by Robert J. Swem in his petition for *habeas corpus,*

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[4]

The statute expressly forbids the following persons to prosecute a writ of habeas corpus: 'Persons committed for treason or felony', and 'Persons convicted, or in execution, upon legal process, civil or criminal'. Mich. Judicature Act, chap. 37, § 8 (3 Mich. Comp. Laws 1929, § 15207 [Mich. Stat. Ann. § 27.2251]).

[5]

Among them: In re Palm, 255 Mich. 632; In re Krusiewicz, 263 Mich. 74, 77-78; In re Offill, 293 Mich. 416, 419; In re Stone, 295 Mich. 207; In re Southard, 298 Mich. 75; and In re Dunning, 310 Mich. 1.

and the issues there presented for decision, had theretofore been finally adjudicated by the Michigan supreme court when, on the 9th day of January 1946, it denied his application for leave to appeal from an order of a judge of the trial court denying petitioner's delayed motion to vacate and set aside his plea of guilty, and the sentence imposed thereon.

(c) The period of time prescribed by law (28 U.S.C. § 350) for applying to this Court for a writ of certiorari (28 U.S.C. § 344) to review the foregoing order of the state supreme court (denying leave to appeal), expired on the 9th day of April 1946 without action on the part of petitioner or his counsel; and the petition for *habeas corpus* was filed in the Michigan supreme court on the 28th day of June 1946.

2. While federal questions were presented in the petition for *habeas corpus*, it does not affirmatively appear from the record that the court's decision of such federal questions was necessary to its determination of the cause.

3. Since the decision of the state supreme court denying *habeas corpus*, might have been either on the state grounds noted above, or on the federal grounds asserted in the petition, and since the state grounds are sufficient to sustain the order, this Court, upon authority of its own decisions,[6] 'will not undertake to review it'.[7]

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[6]

Klinger v. Missouri, 13 Wall. 257; Allen v. Arquimbau, 198 U. S. 149, 154-155; Lynch v. New York, 293 U. S. 52; Honeyman v. Hanan, 300 U. S. 14, 18.

[7]

Williams v. Kaiser, 323 U. S. 471, 477-479, citing the cases listed supra in footnote 6.

III

Argument.

Point One

Decisive, substantial, non-federal grounds sustain the Michigan court's order denying writ of habeas corpus.

It is, in the first place, by no means certain that the Michigan supreme court decided a federal question when it denied the writ of *habeas corpus,* stating in the order (24) that the court found 'there is no merit in defendant's petition, he was not deprived of securing counsel, and under our decisions he cannot complain, particularly at this late date'. There is no mention of due process, or denial thereof, and the decision may have turned on some question of fact. In the absence of a written opinion, it would be unfair to say that through the foregoing summary order the highest court of the State deliberately denied the petitioner due process of law.

Be that as it may, however, there are several decisive, substantial, non-federal grounds to sustain the order denying *habeas corpus*: (1) the procedure was not the proper or appropriate one to determine the question, and, under Michigan law, petitioner had no absolute right to prosecute the writ; (2) the federal questions raised in the petition had been considered when presented to the trial court in petitioner's motion for leave to file a delayed motion for new trial, and they were rejected by the supreme court when it denied application for leave to appeal therefrom; (3) no timely application was made to this Court for certiorari to review the foregoing order of the

Michigan court; the three-month period of time prescribed by law (28 U.S.C. § 350) for making such an application, had long since expired when Robert J. Swem petitioned the state supreme court for *habeas corpus;* and the matters and things set forth in his petition for *habeas corpus* had therefore been fully and finally adjudicated long before petitioner applied to the state court for *habeas corpus.*

1

Under Michigan law and judicial decisions, petitioner had no absolute right to prosecute the writ of habeas corpus; and such procedure is inappropriate.

Article 7, § 4, of the Michigan State Constitution, confers upon the supreme court 'a general superintending control over all inferior courts' and 'power to issue writs of error, *habeas corpus,* mandamus, quo warranto, procendo and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only'.[8]

Exertion of such power is controlled by Chapter 37, §§ 7- 12, of the Michigan Judicature Act (3 Mich. Comp. Laws 1929, §§ 15206-15211 [Mich. State. Ann. §§ 27.2250-2255], and the procedure is there prescribed.

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[8]

The State Constitution (article 2, § 11) also provides that 'the privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it'. Compare Federal Constitution, article 1, § 9, cl. 2. And circuit judges may also issue the writ in certain instances (State Const., article 7, § 10.

Section 7 of that chapter provides that

> "Every person committed, detained, confined or restrained of his liberty within this state, for any criminal or supposed criminal matter, or under any pretense whatsoever, *except in the cases in the next section specified*",

may prosecute a writ of habeas corpus (3 Mich. Comp. Laws 1929, § 15206 [Mich. Stat. Ann. § 27.2250]).

The next section (§8) provides in substance as follows:

> "The following persons shall not be entitled to prosecute such writ:
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> 1. (Those held under federal process).
>
> 2. Persons committed for treason or felony, or for suspicion thereof, or as accessories before the fact to a felony, where the cause is plainly and specially expressed in the warrant of commitment.
>
> 3. Persons convicted, or in execution, upon legal process, civil or criminal . . . " (3 Mich. Comp. Laws 1929, § 15207 [Mich. Stat. Ann. § 27.2251]).

Section 11 prescribes the form of petition for habeas corpus, and provides what it must state, among other things that 'such person is not committed or detained by virtue of any process, judgment, decree or execution specified in the preceding eighth [8th] section' (3 Mich. Comp. Laws 1929, § 15210 [Mich. Stat. Ann. § 27.2254]).

And section 12 provides that the prit shall be granted without delay 'unless it shall appear from the petition

itself, or from the documents annexed, that the party applying therefor is, by the provisions of this chapter, prohibited from prosecuting the writ'.

The judicature act (Act No. 314, Pub. Acts Mich. 1915) revised and consolidated statues relating to practice and procedure, while chapter 37 thereof, applying to *habeas corpus*, reenacted chapter 134 of the revised statutes of 1946.[9] Thus for upwards of 100 years, without challenge on constitutional grounds, Michigan law has expressly forbidden collateral attacks upon final judgments in criminal cases, and it has provided as a substitute the remedy of new trial and appeal in the nature of a writ of error.[10]

The common-law writ of error *coram vobis* (or *coram nobis*,) 'has never obtained in this state, having been rendered obsolete by statutory methods of correcting error',[11] and in comparatively recent years the law, as interpreted by the state supreme court,[12] has permitted a person long convicted of crime and deeming himself aggrieved by some injustice to move the court of original

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[9]

See Michigan Comp. Laws 1857, § 5210 et seq.; idem., 1871, § 6903 et seq.; Howell's Stat. § 8554 et seq.; Comp. Laws 1897, § 9858; idem., 1915, § 13459, et seq.

[10]

Mich. Code of Criminal Procedure, chap. 10 (Mich. Comp. Laws 1929, § 17355 [Mich. Stat. Ann. § 28.1098] et seq.).

[11]

Dewey v. Otsego Circuit Judge, 250 Mich. 377, 379.

[12]

People v. Hurwich, 259 Mich. 361; People v. Burnstein, 261 Mich. 534.

jurisdiction for leave to file a delayed motion for new trial.[13]

Through a long, unbroken line of decisions,[14] the supreme court of this State has followed in principle the spirit, if not the strict letter, of these statutes, holding that the writ of *habeas corpus* cannot function as a writ of error, since it deals only with radical defects rendering a proceeding or judgment absolutely void.[15]

Michigan decisions on this subject fall roughly into four groups:

1. As a general rule, the court has merely held that the writ of *habeas corpus* cannot be made to take the place of a writ of error, and it has denied or dismissed the writ; it has, e. g., refused by such process to test the sufficiency of a ninformation charging crime;[16] it has refused through *habeas corpus* to pass upon the validity of an order made in pursuance of a statute, committing to state prison until further order one tried for murder

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[13]

This was the 'recognized Michigan procedure' followed by the petitioner in De Meerleer v. Michigan, October Term 1946, No. 140.

[14]

Departed from in some few instances as a matter of grace.

[15]

The 'radical defects' to which the court has repeatedly referred are, quite patently, those of jurisdiction. 'Habeas corpus is not available to one who has been convicted of crime by a court that has properly acquired jurisdiction and has not exceeded its powers'. In re Krusiewicz, 263 Mich. 74, 77. See Gillespie's Michigan Criminal Law and Procedure, Vol. I, p. 841, § 705.

[16]

It re Eaton, 27 Mich. 1.

and acquitted by reason of insanity, to be confined in an insane asylum adjoining the prison, ruling that the question should be raised by writ of error or other appropriate remedy;[17] it has declined to use the writ to determine the correct place of confinement under a sentence for crime;[18] it has refused in *habeas corpus* to pass upon the validity of a sentence;[19] or to consider questions arising out of the habitual criminal act; [20] or to release a prisoner held under the authority of Federal process;[21] or to inquire into the voluntariness of a plea of guilty;[22] and the court has held that a petitioner for *habeas corpus* should not be discharged from custody when by the return it appears that he has been convicted by a court of competent jurisdiction of an offense properly charged and which subjected him to the punishment meted out.[23]

2. The writ has been honored in a few exceptional cases where commitment to prison or other state institu-

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[17]
In the Matter of Underwood, 30 Mich. 502.

[18]
In the Matter of Coffeen, 38 Mich. 311.

[19]
In re Vitali, 153 Mich. 514; In re Guilmente, 201 Mich. 684.

[20]
In re Gardner, 263 Mich. 122

[21]
In re Abbott, 267 Mich. 703, holding that such use of the writ is expressly forbidden by chapter 37, § 8, of the judicature act.

[22]
In re Offill, 293 Mich. 416.

[23]
In re Lewis, 124 Mich. 199, 201.

tion was issued by a court lacking jurisdiction,[24] or authority to sentence the prisoner to some particular jail or penitentiary;[25] or where the petition for *habeas corpus* challenged the authority of a Detroit police court to hear, try, and determine cases arising under the charter of that municipality;[26] or where it was contended that a certain jurisdictional statute had been repealed by subsequent legislation,[27] the court, however, declining to review other claimed irregularities in the sentence.

3. In comparatively recent years the court has decided questions of law presented in petitions for *habeas corpus*, but in each instance it has been careful to point out that such a writ cannot be permitted to function as a writ of error. In one case the court, having issued the writ of *habeas corpus* to the prison warden, and its ancillary writ of certiorari to the trial court, discharged the prisoner on the ground that his conviction for second felony, following conviction of unlawful possession of narcotic drugs, was void because the first offense was a misdemeanor, not a felony,[28] but it said:

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[24]

In re Morton, 10 Mich. 208; Hamilton's Case, 51 Mich. 174; Goodchild v. Foster, 51 Mich. 599; Palmer v. Judge, 83 Mich. 528; Ex Parte Allen, 139 Mich. 712.

[25]

In re Allen, supra; In re Bolden, 159 Mich. 629; In re Grabinski, 213 Mich. 108.

[26]

In re Bushey, 105 Mich. 64, 70, the court saying: 'Jurisdiction is the only question open on habeas corpus'.

[27]

In re Butler, 133 Mich. 485.

[28]

In re Moynahan, 255 Mich. 497.

> "In doing this we do not intend to substitute *habeas corpus* for appeal, but, having issued the writ, accompanied by a writ of certiorari, we have had to go behind the warrant of commitment and there find and we can now see the error we would have to find and see in case of an appeal".

In another case decided the same term,[29] the court considered several constitutional questions involving Michigan's habitual criminal law,[30] rejecting them as without merit, but it adhered to the general rule that the writ of *habeas corpus* cannot function as a writ of error.[31]

The petitioner in most of these cases and those hereafter cited, appeared *in propria persona* and it was probably for this reason that the court indicated its opinion on some of the questions raised; in no case was the petitioner discharged from custody.

Thus, in a later case,[32] the court expressed its opinion that the offense of breaking and entering a post office rented by the postmaster came within state jurisdiction following which it passed once more on certain phases of Michigan's habitual criminal law (its constitutionality

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[29]
In re Palm, 255 Mich. 632, 634. See People v. Palm, 245 Mich. 396.

[30]
Mich. Code of Criminal Procedure, chap. 9, § 12 (Mich. Comp. Laws 1929, § 17340 [Mich. Stat. Ann § 28.1084]).

[31]
Citing: Goto v. Lane, 265 U.S. 393.

[32]
In re VanDyke, 276 Mich. 32; certiorari denied, 290 U.S. 608.

and applicability), reasserting, however, that the writ of *habeas corpus* 'cannot function as a writ of error; neither may it serve to review or consider questions foreclosed by previous writs of error'.[33]

Other cases considered the sufficiency of informations,[34] but held that *habeas corpus* was not available; and passed upon the constitutional validity of Michigan's indeterminate sentence law,[35] saying, however,

> "We have thus repeatedly held that *habeas corpus* will not be permitted to perform the functions of a writ of error. . . . Although his remedy is not by *habeas corpus* and his petition for that writ must be denied, we shall, however, in this instance reexamine the question of the constitutionality of the indeterminate sentence law. *We do this in order that we may again show the futility of continued applications to this court, based upon the claim that the petitioner and others in like circumstances are illegally confined in State institutions*".

In the first of the last two cases of this kind decided,[36] the court held that under an information specifically charging the defendant with having committed the offense of incest with his daughter, where the jury con-

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[33] In re Brazel, 283 Mich. 632.

[34] In re Stone, 295 Mich. 207.

[35] In re Southard, 298 Mich. 75, 78; certiorari denied, 314 U. S. 659.

[36] In re Dunning, 310 Mich. 1.

victed him of such charge, it necessarily found defendant was the father of the girl involved, and that such a disputed question of fact could not be determined on *habeas corpus*, but should be raised on motion for new trial. 'The law is well settled that *habeas corpus* proceedings and the ancillary writ of certiorari are not a substitute for writ of error or appeal'.

And in the second case,[37] the court overlooked the rule 'often repeated here that the writ of *habeas corpus* cannot function as a writ of error', in order that it might consider important questions.[38]

Obviously the case at bar and those of like nature should be controlled by the Michigan rule which recognizes that the remedy of *habeas corpus* is inappropriate and unsuitable to determine questions involving disputed facts. The supreme court is not equipped for such a task, and reference proceedings are at best unsatisfactory. The printed record in this cause clearly indicates that the essential facts are disputed,[39] and we respectfully submit the trial court is the proper forum to resolve

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[37]

In re Elliott, 315 Mich. 662.

[38]

It should be noted that in the Elliott case (decided before this Court handed down its opinion in De Meerleer), the attorney general recommended that the writs issue, and that the matter be referred to a circuit judge.

[39]

The State's answer (12-19) denies many of the allegations of the petition for habeas corpus; it denies that the accused and his companions were held entirely incommunicado (14); it reveals that petitioner gave full details of the crime (14); and it shows that the trial judge safeguarded the rights of the accused.

the issues. It is only fair that the trial judge who is accused of denying fundamental rights should first have opportunity to investigate and if in error rectify the injustice.

2

The federal questions raised in Swem's petition for habeas corpus, had theretofore been determined by the state supreme court in its order denying leave to appeal, and since petitioner did not make timely application to this Court for certiorari, they are res judicata.

Petitioner alleged (5-6) to the court below that in September 1945 to moved the trial court to set aside his plea of guilty upon the ground that such plea was made in ignorance of his rights (5); that his petition was denied by the successor in office to the trial judge; that he applied to the Michigan supreme court for leave to appeal from such denial; and that on the 9th day of January 1946 the supreme court denied his application (6).

The records of the supreme court in the case of People v. Robert J. Swem (Calendar No. 43313½) disclose the following: that in accordance with court rule 60 petitioner's present counsel prepared and the trial court certified a concise statement of the proceedings and facts so far as they were material to an appeal, and that this concise statement was attached to his application for leave to appeal; and, further, that the concise statement so certified, recited that in September 1945 Robert J. Swem filed his motion to vacate plea and sentence upon the ground

> "that the plea of guilty entered by the applicant was made in ignorance of his rights, as provided by the Fourteenth Amendment . . . in that the applicant . . . at the time of his plea and sentence was a boy under the age of . . . 18 years, incapable of adequately making his own defense because of ignorance of the various degrees included in the charge placed against him, had a very limited education, was unable, because of financial reasons, to employ counsel, was totally and wholly ignorant of his right to demand that counsel be appointed to represent him, and, further, that the said defendant did not at any time knowingly, or intentionally, waive any right that he might have had to be represented by counsel".[40]

The records of the court below also show that petitioner's counsel filed in the supreme court of Michigan a brief in support of his application for leave to appeal, in which he relied upon certain decisions of this court,[41] and pointed out that decisions of the supreme court of the State of Michigan were in conflict;[42] and he argued that since the applicant's fundamental rights had been violated, he was entitled to a new trial.

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[40]

These allegations reappear (in somewhat less elaborate form) in the petition for habeas corpus (4-5), and almost verbatim in petitioner's affidavit (22-23) attached to his counsel's reply to the State's answer.

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Hawk v. Olson, 326 U. S. 271; Powell v. Alabama, 287 U. S. 45; Williams v. Kaiser, 323 U. S. 471; Rice v. Olson, 324 U. S. 786.

[42]

People v. Crandell, 270 Mich. 124; People v. Fries, 294 Mich. 382; People v. Haddad, two cases, 306 Mich. 556, and 561.

Petitioner's application for leave to appeal was denied without comment on the 9th day of January 1946, and he allowed the 90-day period prescribed by the Congress (28 USC § 350) to expire without applying to this Court for a writ of certiorari to review the order of the state supreme court denying leave to appeal (28 USC § 344).

The time within which a petition for writ of certiorari might have been filed in this Court expired on the 9th day of April 1946. Then, realizing his predicament, Swem started all over again by filing in the state supreme court the petition for *habeas corpus* now under scrutiny. But, following his own set pattern of tardiness, Swem did not file his petition for *habeas corpus* until June 28, 1946, two months and 19 days after expiration of the time for petitioning this Court for certiorari.

We, therefore, respectfully submit that decisive, substantial, non-federal grounds sustain the order of the court below.

Point Two

The state court's decision of federal questions was not necessary to determination of the cause; and since it might have been either on state or federal grounds, and since the state grounds are sufficient, the writ of certiorari should be denied.[43]

We have established the premise that state grounds (the impropriety of the remedy, and the former adjudication of the questions) are sufficient to sustain the order

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[43] This covers points 2 and 3 in the summary of argument.

denying *habeas corpus;* and it is perfectly plain that the decision of the state supreme court might have been on such non-federal grounds. Certainly the court's decision of such federal questions as were presented in the petition for *habeas corpus,* was not necessary to its determination of the cause. Indeed, the cause (insofar as federal questions were concerned) had already been determined over two months ago.

As this court has often said,[44] and recently repeated:[45]

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause",
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> *Honeyman v. Hanan,* 300 U.S. 14, 18.
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> "And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it",
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> *Williams v. Kaiser,* 323 U.S. 471, 477.

The case of *Kaiser, supra,* closely resembles but may be distinguished from the case at bar. There, as here,

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[44] Honeyman v. Hanan, 300 U. S. 14, 18.

[45] Williams v. Kaiser, 323 U. S. 471, 477-479.

the petitioner for certiorari applied to the state court for a writ of *habeas corpus* to release him from imprisonment on the ground that he had been denied due process of law. There, as here, the state court denied the writ; but there the resemblance ceases. In the *William-Kaiser* case, this Court, upon search of the record, found no independent state ground to support the denial; and, as Mr. Justice Douglas said:

> "The Attorney General of Missouri only goes so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute. . . . And Missouri suggests no other state ground which might be the basis of the decision. That is to say, the only state grounds which have been advanced in support of the decision below appear to be insubstantial".

Here, the Attorney General of Michigan goes much further to assert that decisive and substantial non-federal grounds sustain the court below, and, to continue the paraphrase, Michigan suggests two decisive state grounds which might be the basis of the decision.

IV

Relief.

We, therefore, respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

Eugene F. Black
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan.

Counsel for Respondent

No. 880. SWEM *v.* MICHIGAN. On petition for writ of certiorari to the Supreme Court of Michigan. March 31, 1947. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the cause is remanded to the Supreme Court of Michigan in order to enable it to reexamine its decision in the light of *De Meerleer* v. *Michigan*, 329 U. S. 663. *William G. Comb* for petitioner. *Eugene F. Black*, Attorney General of Michigan, and *Edmund E. Shepherd*, Solicitor General, for respondent.